

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SHANDS JACKSONVILLE MEDICAL CENTER, INC.

and

Cases 12-CA-026649
12-CA-027197
12-CA-026829

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
COUNCIL 79, AFL-CIO

and

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
LOCAL 1328, AFL-CIO

and

DELLA HIGGINBOTHAM, An Individual

Rafael Aybar, Esq., for the Acting General Counsel.
Charles P. Roberts, III, and *John F. Dickinson, Esqs.*
(*Constangy Brooks & Smith, LLP*), of Winston-Salem,
North Carolina, and Jacksonville, Florida, for the
Respondent.
Alma R. Gonzalez, Esq. (AFSCME Florida Council 79),
of Tallahassee, Florida, for the Charging Party Unions.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This case arises out of an order further consolidating cases, consolidated complaint and notice of hearing issued on November 29, 2011 (the complaint), stemming from unfair labor practice (ULP) charges filed against Shands Medical Center (the Respondent or the Hospital) by American Federation of State, County and Municipal Employees Council 79, AFL-CIO, and American Federation of State, County and Municipal Employees Local 1328, AFL-CIO (jointly the Union unless differentiated), and Della Higginbotham, an individual.

I held a trial in Jacksonville, Florida, on April 23–25, 2012, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On the first day of hearing, I approved a non-Board settlement agreement executed by the Respondent, the Union, and Jacqueline Cangro, one of the two discharged employees named in the complaint.¹ It provided, inter alia, for withdrawal of the charges filed in Case 12–CA–27197, including the allegation relating to her discharge. Accordingly, the legality of her termination is not now before me. I grant the Acting General Counsel’s unopposed motion to correct the transcript.

Issues

- (1) Should I defer to the February 3, 2011 award of Arbitrator Richard H. Potter, who ordered Mischaun Palmer reinstated without backpay or credit for time lost for seniority, vacation, or sick leave purposes? The Acting General Counsel argues that deferral is inappropriate because the arbitrator did not consider the ULP issue, and his award was repugnant to the Act. The Respondent contends that deferral is proper.
- (2) If I reject deferral, did the Respondent violate Section 8(a)(3) and (1) by discharging Palmer on February 12, 2010,² because of her protected union activity, more specifically, her activities as union recording secretary and steward and her distribution of a union flyer? Palmer avers that she distributed the flyer on February 5 in a nonwork area on nonwork time, whereas the Hospital contends that she did so in a work area (the “Pond”) between 3:30 and 4 p.m. on February 4, without clocking out for union business.
- (3) Did Greg Williams, director of clinical services, on April 7, threaten RN Higginbotham that the Hospital would cause her to lose her nursing license if she filed a grievance over her discharge, thereby violating Section 8(a)(1)?
- (4) Has the Respondent violated Section 8(a)(1) by maintaining a work rule that “unauthorized distribution of written or printed materials of any description” is a ground for disciplinary action?

Witnesses and Credibility

As to Palmer’s discharge, the following witnesses testified, with their positions at the time:

- (1) Hospital representatives Daniel Kurmaskie, director of patient access; and Daniel Staifer, director of employment and employee relations.
- (2) Employees Vivian Griffin, Ethel Overstreet, and Sharnee Thomas, for the Hospital.

¹ R. Exh. 1. The Acting General Counsel objected to my approval of the agreement but waived the right to file a special appeal to the Board under Sec. 102.26 of the Board’s Rules and Regulations.

² All dates hereinafter occurred in 2010 unless otherwise indicated.

(3) Employees Cangro, Palmer, and Rutha Harris, for the Acting General Counsel.

Higginbotham and Williams testified about what was said at the former's discharge interview on April 7.

Griffin, Overstreet, and Thomas were reasonably consistent but not identical in their accounts of what transpired on the afternoon of February 4, and they were substantially consistent with the testimony that they offered at the November 10 arbitration hearing, as well as in the statements that they gave to the Hospital in February. For example, Overstreet testified that Palmer gave her the flyer at between 3:30 and 3:45 p.m., Thomas that it was between 3:30 and 4 p.m., and Griffin that the flyer was left on her chair prior to 3 or 3:30 p.m. This lends support to the conclusion that they were truthful in relating what had occurred, rather than attempting to orchestrate their testimony. Furthermore, all were union members in February, and none of them appeared to try to slant their versions of the facts to harm Palmer, either at trial, at the arbitration hearing, or in their statements to the Hospital. In this regard, Arbitrator Potts, in finding them credible and crediting their testimony over Palmer's, noted that they offered testimony that, in part, supported Palmer.³ At trial, Overstreet did the same as far as testifying about the Hospital's lack of enforcement of its prohibition against unauthorized distribution.

Palmer and Cangro testified that Palmer did not distribute the flyer on the afternoon of February 4 in the Pond area. Aside from being contradicted by the three employees named above, as well as Kurmaskie's and Staifer's testimony, Palmer's testimony that she did not distribute it until the following morning is undermined by Respondent's Exhibit 13, showing that management had the flyer in its possession prior to 5:30 p.m. on February 4. At the arbitration hearing, she suggested that someone might have rummaged through the tote bag containing union business that she kept at her desk, and removed the flyer,⁴ but she did not repeat this far-fetched contention at trial. Further, Palmer's testimony about whether she had the completed flyer in her tote bag during the workday on February 4 was confusing. In this regard, she equivocated, initially testifying that she did not actually have the flyer but "a stack of stuff where I had been cutting and pasting,"⁵ then that she did have the flyer but that it had not been printed or copied. Why she would have brought to work both the finished document and prior draft materials remains unexplained. I further note that no other witnesses corroborated Palmer's testimony that she distributed the flyer on the morning of February 5 in a nonwork area on nonworktime.

I discredit Cangro's testimony that she was in the Pond between 3:30 and 4 p.m. on February 4 and did not observe or hear Palmer distribute anything. Cangro testified at the arbitration hearing but failed to offer such testimony in support of Palmer. Moreover, Cangro was present as Palmer's union representative not only at Palmer's discharge interview but at an earlier investigatory meeting, yet at no time did she tell management that she was a corroborating witness for Palmer. I find this unfathomable.

Harris' testimony was essentially hearsay because it entailed statements that Palmer made to her on the mornings of February 4 and 5, when they drove to work. I do note that Harris

³ R. Exh. 30 at 10.

⁴ R. Exh. 5 at p. 182.

⁵ Tr. 162.

testified that Palmer stated on the morning of February 4 that she had not yet finished the flyer, but Palmer testified that she had the completed flyer in her tote bag that day.

5 For the above reasons, as did Arbitrator Potts, I credit Griffin, Overstreet, and Thomas over Palmer concerning Palmer's activity on the afternoon of February 4 in the Pond.

10 Both Kurmaskie and Staifer testified that the former made the decision to discharge Palmer. Kurmaskie was not a credible witness on this matter, for the following reasons. He was evasive in answering whether Palmer would have been discharged in the absence of any prior disciplines; or, put another way, whether the Respondent would have terminated her solely because of her misconduct on February 4. Despite my repeated efforts, I could not get Kurmaskie to give a straight answer to this question. I note that Staifer was also equivocal on this point.

15 Kurmaskie testified that Griffin, Overstreet, and Thomas all expressed to him displeasure over Palmer's giving them the flyer. However, none of them testified that they complained in any way, consistent with their email statements to him and their testimony at the arbitration hearing. On the contrary, all three made it clear at trial that they did not complain about Palmer's conduct, and Overstreet testified that she merely showed the flyer to Supervisor Natalie Butler and simply asked whether Butler had seen it.

20 To be discussed later on, there were discrepancies between what Kurmaskie testified were the reasons for the falsification violation listed on Palmer's termination paper and what was expressly stated therein.

25 Finally, Kurmaskie demonstrated a marked tendency to deflect specific questions by answering in generalities rather than directly responding.

30 For said reasons, I credit Kurmaskie only where his testimony was corroborated by more reliable evidence.

35 Turning to the allegation relating to Higginbotham, Higginbotham was not a persuasive witness. She had only a vague recollection of what was stated at the April 7 termination meeting, explaining that "I wasn't really in the conversation" between Williams and Manager Carissa Davis.⁶ On cross-examination, Higginbotham first testified that at the meeting, management did not explain that she had improperly restrained a patient but, rather, that Davis said such in a separate phone conversation. However, she then testified that she did not remember, and she was later impeached by her August 30 affidavit, in which she stated that this was explained to her at the meeting. Her explanation that the event occurred 2 years ago and she could not recall everything that happened was unconvincing. I also note that she exhibited a lackadaisical attitude, to the point where she did not seem concerned with making a genuine effort to be as accurate as possible in relating what took place.

40 Williams exhibited a better recall of what was said at the meeting. The only negative as far as his credibility was that he first testified on cross-examination that he could not recall a

⁶ Tr. 109.

grievance meeting over the discharge (adding, however, “I’m not sure though”)⁷, but then testified that he did attend the third-step grievance meeting after being shown General Counsel’s Exhibit 29. This one defect in his testimony paled in comparison to the weaknesses that Higginbotham demonstrated as a witness, and I credit his account over hers.

Had Higginbotham been more credible, I would consider drawing an adverse inference against the Respondent for its failure to call Davis, as the Acting General Counsel urges (Br. at 25 fn. 10), but it is well-established Board law that even uncontroverted testimony of an unreliable witness can be discredited. See, e.g., *Pacific Coast M.S. Industries Co.*, 355 NLRB 1436, 1442 (2010); *Jupiter Medical Center Pavilion*, 346 NLRB 650, 652 (2006).

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, and stipulations, as well as the thorough posttrial briefs that the Acting General Counsel and the Respondent filed, I find the following.

Background

The Respondent operates an acute-care hospital in Jacksonville, Florida, and has admitted jurisdiction as alleged in the complaint.

The Hospital has about 3500 employees, approximately 500 of whom are managers or supervisors. The Council represents about 2000 of the employees, in two units: professionals and nonprofessionals. Local 1781 services the former; Local 328 the latter. Both units are encompassed by a collective-bargaining agreement (the agreement) effective from September 10, 2009 through June 30, 2012.⁸ Pertinent provisions of the agreement follow.

Article 3, management security, opens with:

Subject to the specific provisions of this Agreement, the Union and its officers, agents, and members agree that during the life of this Agreement, they shall have no right to instigate, promote, sponsor, engage in, or condone any strike, slowdown, concerted stoppage of work, intentional interruption of employer operations, or similar activities during the term of this Agreement for any reason. . . . Management shall have the right to discharge or otherwise discipline any or all employees who violate the provisions of this paragraph. . . .

The article contains a provision on distribution, which the Acting General Counsel does not allege violates the Act.

Article 7 addresses union activity and provides, inter alia, that union stewards be allowed reasonable time to conduct union business during normal working hours provided that they clock into a union business cost center established under the Hospital’s payroll system.

⁷ Tr. 253.

⁸ R. Exh. 35.

Article 8 sets out the grievance procedure, starting with an oral phase before the filing of a written grievance and going up to a third step, at which there is review by the Hospital's human resources (HR) vice president or his or her designee. If not resolved at step III, either the Hospital or the Union may request an arbitrator through the Federal Mediation and Conciliation Service.

The arbitration provision states, *inter alia*:⁹

Any decision or award of the arbitrator shall be strictly limited to the interpretation of specific terms of this Agreement, and to a determination of (a) whether the grievance is arbitrable, and (b) whether a specific provision of this Agreement was violated as alleged in the written grievance. . . . The arbitrator shall review the Employer's action and shall determine whether it is based upon competent, substantial evidence; if it is, it shall be upheld. The arbitrator's decision shall be final and binding upon all parties. . . .

It is specifically and expressly understood that taking a grievance to arbitration constitutes an election of remedies and waiver of any and all other rights by the appealing party and all persons it represents. . . .

Article 9 concerns discharge and discipline. Article 9.A provides that suspensions, demotions for cause, and dismissals may be appealed directly to step III. Article 9.B provides, in part, that management "shall use progressive disciplinary methods where appropriate. . . ."¹⁰

A Hospital policy on corrective actions (CA's) also enunciates the principle of progressive discipline, stating that it will "normally be applied," depending on the seriousness of the offense.¹¹ The policy further provides for four levels of discipline: counseling, written reprimand, suspension without pay (with the length to be determined after consultation with HR), and discharge. CA guidelines incorporated into the policy list three classes of offenses. A class III offense is the most serious, for which even a first offense may cause termination.

Palmer's Discharge

I. Palmer's Employment and Union Activity

Palmer was a financial admissions representative from May 2001 until her discharge on February 10. Her regular duties were registering patients for inpatient/outpatient service and verifying insurance. In February, she worked from Monday through Friday from 7:30 a.m. to 4 p.m.

Palmer had an assigned desk in the clinical admissions front area and also used a desk in the Pond. Five other financial admissions representatives worked in the pond and had assigned

⁹ Id. at p. 18.

¹⁰ Id. at p. 19.

¹¹ R. Exh. 6 at p.1.

cubicles: Cangro, Kim Covington, Griffin, Overstreet, and Thomas.¹² Their supervisor, Novetta Butler, reported to Manager Shirley Forbes.

Palmer was Local 1328's recording secretary since 2009 and a union steward since 2008. In those capacities, she attended management-union meetings and represented employees in grievance proceedings. Before engaging in union business, she notified management and then clocked out of worktime and into a union call center number or code.

II. The Flyer and its Distribution

In January, Palmer began composing a flyer concerning employee's complaints that their work was not getting done when they were off on sick leave, and delays in management's having other employees relieve them. She did this with the approval of Nicolas Dix, the Union's regional director, and with Cangro's assistance.

Respondent's Exhibit 9 is the four-page flyer ultimately produced. The flyer's first page asked, "What would happen to the employees at Shands without a union?" The second page asked, inter alia, the following:

- (1) What would Shands do if all the nurses called out for one day?
- (2) What would Shands do if all the radiology techs decided to leave at 10:00 a.m.?
- (3) What would shands do if all registrars and customer service reps decided Friday and Saturday is a good day to stay home and enjoy?
- (4) What would Shands do if all labs called out?
- (5) What would Shands do if the OR techs were no show for a day?

The document proceeded to criticize Hospital management and to encourage employees to voice their complaints and concerns.

There is no dispute that the flyer was finished at some point on February 4.¹³ It is also undisputed that Palmer did not clock out for union business on the afternoon of February 4.¹⁴ The disagreement is whether Palmer distributed the flyer that afternoon on her and other employees' worktime.

For reasons previously stated, I credit Griffin, Overstreet, and Thomas over Palmer and Cangro. Vis-à-vis Griffin and Thomas, Overstreet offered the most detailed testimony, and I accord it the most weight.

Griffin, Overstreet, and Thomas were working in the Pond at between 3:30 and 4 p.m., when Palmer came by. She handed a flyer to Overstreet and Thomas and left one on Griffin's chair. Overstreet asked what it was, and Palmer replied that it was a flyer for her to ponder. A few minutes later, Palmer came back to Thomas' desk and asked if she had any questions. Thomas replied no. After finding the flyer on her chair, Griffin went over to Thomas' cubicle.

¹² See R. Exh. 8, a diagram.

¹³ See Palmer's testimony at Tr. 157; R. Exh. 13, showing that it was faxed at 5:30 p.m. that day.

¹⁴ See R. Exh. 16.

At that time, Palmer came over and asked if Griffin understood it. Griffin replied no. Palmer offered an explanation, but Griffin responded that she still did not understand.¹⁵

5 When Butler later arrived at the Pond, and Overstreet asked if she had seen the flyer. Butler replied no, and Overstreet gave it to her. Butler asked how she had received it, and Overstreet replied that Palmer had passed it out. Butler commented, “[T]his is awful,” thanked her, and left with the flyer.¹⁶

10 Kurmaskie testified that Butler and Forbes came to his office with the flyer at about 5 p.m. on February 4, and I credit him on that point. Significantly, Respondent’s Exhibit 13 shows that he faxed the flyer to HR at 5:30 p.m. that day, which I also find as a fact. Kurmaskie testified that they told him employees were “concerned, offended, and complained,”¹⁷ but nothing in Griffin’s, Overstreet’s, and Thomas’ testimony or their written statements to management supports this characterization of their reactions. I therefore find it unnecessary to
15 draw an adverse inference for the Respondent’s failure to call Butler (who was terminated shortly after Palmer) or Forbes to corroborate Kurmaskie.

III. The Respondent’s Investigation and Decision to Discharge Palmer

20 Kurmaskie conducted the subsequent investigation, after which he decided that Palmer should be discharged.

25 On about February 5, Kurmaskie met individually with Griffin, Overstreet, and Thomas. He asked them to provide statements of what occurred, and all three subsequently sent him one-paragraph emails.¹⁸ Therein, Griffin and Overstreet made mention of being confused or not understanding the flyer, whereas Thomas did not express any reaction.

30 The Hospital determined by Monday, February 8 that Palmer had not clocked out for union business on February 4.¹⁹ That afternoon, Kurmaskie and Butler had a meeting with Palmer, Cangro, and Gale Forest, the Local’s vice president, concerning Palmer’s distribution of pamphlets on February 4. Kurmaskie showed Palmer the flyer and asked if she had handed it out on the morning of February 4; she replied no, that she had done so on the morning of Friday, February 5.²⁰ He asked her to provide a written statement, and she did so.²¹ Therein, she stated:

35 This statement is in regards[sic] to an allegation that . . . I gave two employees a packet and that I disturbed them during working hours of 3:00 pm and 4:00 pm. on Thursday, February 4, 2010.

¹⁵ Tr. 304, consistent with her testimony at the arbitration hearing. R. Exh. 5 at p. 64; her later testimony, *id.* at 68, that “Sharnee” asked if she understood it, was apparently an inadvertent error.

¹⁶ Tr. 266.

¹⁷ Tr. 326.

¹⁸ R. Exhs. 10 (Overstreet, February 10), 11 (Thomas, February 5), and 12 (Griffin, February 9).

¹⁹ See R. Exh. 37.

²⁰ Consistent testimony of Kurmaskie and Palmer at Tr. 174, 342–343.

²¹ R. Exh. 15, dated February 9.

During the hours of 3:00 pm and 4:00 pm on Thursday, February 4, 2010 I was busy working on my scheduled work duties.

Friday, February 5, 2010, I arrived at work early and passed out some very important information and clocked in on my normal working hours which are 7:30 am.

Palmer was discharged at a meeting on February 12, attended by the same individuals who were at the February 8 meeting, along with Rosemary Mason of HR. Respondent's Exhibit 2 is the CA (discharge) that Kurmaskie issued to her.

At the top of the document, six prior CA's (four written counselings and two written reprimands) in 2008 and 2009 are listed for the past 2 years.²² As earlier noted, both Kurmaskie and Staifer were evasive in answering what role, if any, the prior CA's played in the decision to discharge Palmer and whether she would have been terminated solely for the events of February 4.

The incident cited for the CA is described as follows:

On 2-4-10, during work time, Mishaun Palmer distributed material promoting or instigation a sickout, work slow down, or work stoppage, to Admissions employees in their work areas and work time. She did not clock out for Union business prior to distributing the material on 2-4-10. According to Ms. Palmer's signed statement on 2-5-10[sic], Ms. Palmer passed the "very important information" in work[sic]areas, and then clocked in at 7:30 a.m.

As to the rules that Palmer violated, the CA cites Class III #26 – falsification of attendance, payroll or other hospital records, and Class II # 4 – unauthorized distribution of written or printed materials of any description and HR 02-019 (the policy on solicitation and distribution). It also lists violations of articles 3:3.1, 3.2(a)2, and 3.2 (a)5 of the agreement, without specific reference to a class of violation.

Kurmaskie testified that the falsification violation included Palmer's denial in her written statement to him that she engaged in distribution activity on February 4, which he had determined to be a lie.²³ In fact, he testified that in deciding to discharge Palmer rather than impose a lesser penalty, "[L]eading off was the fact that she lied and that we had witnesses stating to the contrary."²⁴ (Emphasis added). However, although the incident description mentions Palmer's signed statement, thereby implicitly raising this as a reason for discharge, her lying during the investigation is not specifically stated as a basis for the falsification ground (Class III #26), or otherwise, in the rule violation section. Additionally, the parties stipulated that the Respondent's position statement submitted to the Region set out the reasons for Palmer's termination and referenced the CA but did not expressly cite her making untruthful statements to management. I find such omissions to be at odds with Kurmaskie's testimony above and yet another factor undermining his overall credibility.

²² See R. Exhs. 17-22.

²³ Tr. 358; see also Tr.371.

²⁴ Tr. 374.

I adopt Arbitrator Potter's unchallenged conclusion that the Hospital laxly enforced its prohibition against unauthorized distribution.²⁵

IV. The Arbitration

On February 15, the Union filed a grievance contending that Palmer's discharge was not for just cause.²⁶ Pursuant to the terms of the agreement, the grievance was advanced to the third step of the grievance procedure, at which it was denied. By letter of April 10, the Union notified the Hospital that it was advancing the grievance to arbitration.²⁷

On February 25, the Union filed charges, including the allegation that Palmer's discharge was in retaliation for her protected union activities.²⁸ By letter of April 23, the Regional Director notified the parties of her decision to defer further proceedings on the matter to the grievance/arbitration process.²⁹

The parties subsequently selected Potter, who conducted an arbitration hearing on November 10. The parties agreed at the outset that the issue was whether the Hospital had just cause to terminate Palmer and whether the level of discipline was appropriate.³⁰ Witnesses included Cangro, Griffin, Kurmaskie, Overstreet, Palmer, Staifer, and Thomas. At the hearing, Palmer's distribution of the flyer, the Hospital's policy restricting distribution and its enforcement, and the Hospital's reasons for discharging her were litigated.

Arbitrator Potter issued his award on February 3, 2011.³¹ Phrasing the issue as whether Palmer was discharged for cause, he concluded in her favor, determining that (1) the Hospital's enforcement of the no-distribution policy was lax; (2) the flyer did not call for a job action in violation of article 3 of the agreement; and (3) Palmer's activity was brief and casual and did not rise to the level that required her to clock out for union business.

However, Potter credited Griffin, Overstreet, and Thomas over Palmer and found that she distributed the literature on the afternoon of February 4. In this regard, he stated:³²

That three union members would lie about a Steward and possibly get her fired simply because they believed she spent too much time on Union duties is beyond belief. The three seemed credible and provided testimony that, in part, supported the Grievant. . . .

As to Palmer's denial that she distributed the flyer on February 4, he concluded:³³

²⁵ R. Exh. 30 at p. 6.

²⁶ R. Exh. 2 at p. 4.

²⁷ Id. at p. 5.

²⁸ GC Exh. 1(a).

²⁹ R. Exh. 4.

³⁰ R. Exh. 5 at pp. 8-9.

³¹ R. Exh. 30.

³² Id. at pp. 9-10.

³³ Id. at 10.

[I]t is clear that she misled Kurmaskie by omission when he questioned her as well as in her written statement and lied under oath at the hearing. . . . [L]ying is a very severe offense. . . .

Based on the above conclusions, he granted the grievance in part but denied it in part, and ordered Palmer reinstated without backpay or credit for time lost for seniority, vacation, or sick leave purposes.

The Hospital, joined by the Union, subsequently requested clarification from Potter whether he intended to downgrade the level of discipline that had been imposed. He responded by letter of February 11, 2011.³⁴

I found that Ms. Palmer did not violate the prohibition against solicitation and distribution or the prohibition against inciting or promoting a job action or work stoppage. However, I did find she lied by omission in a written statement and in an interview with her supervisor, as well as by commission under oath at the hearing.

Although I didn't uphold the discharge, I believe returning her to work after almost a year without backpay is a severe penalty. Indeed, although it isn't explicitly a suspension, it has the same impact. I believe a designation such as "lost time as a result of discipline" correctly describes her status.

Pursuant to the terms of the award, Palmer returned to work on February 21, 2011, at which time she resumed her role as a union steward. She had continued to serve as recording secretary after her discharge. She currently holds both positions.

V. Discipline of Other Employees

The Acting General Counsel offered a number of CA's involving misrepresentation by employees,³⁵ as follows. All occurred in 2009 and, with the exception of the first, cited class III #26, falsification of records.

(1) Written reprimand for Class III #6 insubordination, for the employee's falsely stating that she had conducted a follow-up appointment with a patient. No prior CA's.

(2) Three-day suspension for falsification of records, violation of policy, and failure to follow work instructions. Eight prior written counselings and one written reprimand.

(3) Three-day suspension for falsification of records, violation of policy, and failure to follow work instructions. Prior discipline – one written counseling, two written reprimands, and one suspension.

(4) Dismissal for falsification of records. One prior written counseling, reprimand, and suspension.

³⁴ R. Exh. 34.

³⁵ GC Exhs. 5, 15-18.

(5) Two-day suspension for falsification of records and violating policy. Five prior written counselings.

The Acting General Counsel also offered two other CA's, both from 2010. The first was a written reprimand issued for a class III #6 violation (insubordination and disrespect), for using profanity to a manager.³⁶ The employee had one prior written reprimand and two written counselings. The second was a written reprimand issued to a supervisor for soliciting employees for money to pay for the cost of his making a holiday cake, a class II violation.³⁷

Supervisor Butler was terminated on February 15, 2010, for unauthorized distribution and solicitation that month.³⁸ She had a prior written counseling, written reprimand, and suspension, all including failure to follow work instructions.

Williams' Statements to Higginbotham

Crediting Williams, I find that during Higginbotham's termination interview on April 7, he explained that she was being discharged for restraining a patient in violation of Hospital policy and that this could constitute a reportable offense to the Florida Board of Nursing or the Joint Commission (an accrediting body) but that he would not be making the determination. The Hospital never reported her.

No-Distribution Rule

At all times material, the Hospital's CA guidelines have included the following as a class II offense: "Unauthorized distribution of written or printed materials of any description."³⁹ Nothing is stated about the impact of any other Hospital policy or of any provisions in the agreement. Counsels' statements at trial and in their briefs suggest that this rule is no longer in effect, but no evidence was introduced to show that it was formally abrogated or that any superseding rule was ever communicated to employees.

Also in effect at all times material has been a written policy specifically on the subject of solicitation and distribution, stating in relevant part that distribution is not allowed during working time or in working areas.⁴⁰ Although the Acting General Counsel now argues that portions thereof are ambiguous and would reasonably be construed by employees to prohibit Section 7 activity (Br. at 27), the complaint refers only to the above CA guidelines and was never amended to include this additional allegation, which therefore was not fully litigated. Accordingly, my finding this additional policy to be unlawful would be inappropriate. See *Baptist Hospital of East Tennessee*, 351 NLRB 71, 72 fn. 5 (2007); *Wal-Mart Stores*, 348 NLRB 274, 274 (2006). The Acting General Counsel has not alleged at any point that the language of article 3 of the agreement relating to distribution is impermissible.

³⁶ GC Exh. 6.

³⁷ GC Exh. 19.

³⁸ R. Exh. 23.

³⁹ R. Exh. 6 at p. 6.

⁴⁰ R. Exh. 7.

Analysis and Conclusions

Palmer's Discharge

5 The threshold issue is whether I should defer to Arbitrator Potter's award, in which event analysis of the legality of her termination under the Act is unnecessary. The Acting General Counsel has presented a two-fold argument against deferral: (1) the arbitrator did not consider the ULP issue; and (2) his award was repugnant to the Act. To determine the validity of these contentions, the legal framework must be examined.

10 As the Board stated in *D. R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 17 (2012):

15 [A]rbitration has become a central pillar of Federal labor relations policy and in many contexts the Board defers to the arbitration process both before and after the arbitrator issues an award. See *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

20 Consistent with this precept, the party seeking to have the Board reject deferral and consider the merits of the ULP matter has the burden of showing that the standards for deferral have not been met. *Id.* at 574; *Kvaerner Philadelphia Shipyard, Inc.*, 347 NLRB 390, 391 (2006) ("[W]here parties have agreed to be bound to an arbitrator's resolution of an issue, the Board will defer to that resolution except in those rare cases in which the arbitrator's decision is 'palpably wrong . . .').

25 Deferral is appropriate when the (1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound by them; and (3) the arbitrator's decision was not clearly repugnant to the Act. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955); see *IAP World Services*, 358 NLRB No. 10 (2012).

30 In *Olin Corp.*, 268 NLRB 573 (1985), the Board added the requirements that (1) the contractual issue was factually parallel to the ULP issue; and (2) the arbitrator was presented generally with the facts relevant to resolving the ULP charge. See also *Turner Construction Co.*, 339 NLRB, 451, 451 fn. 2 (2003). The arbitrator need not have been presented with the relevant law relating to the ULP in question, and his or her decision need not have contained a rationale showing consideration of the ULP allegation; rather, the test is whether the evidence before the arbitrator was "essentially the same evidence necessary for a determination of the merits of the unfair labor practice charge." *Andersen Sand & Gravel Co.*, 277 NLRB 1204, 1205 (1985); see also *Laborers Local 294*, 331 NLRB 259, 261 (2000).

40 The Acting General Counsel contends that background evidence of the Respondent's animus toward Palmer for her union activity was not presented to the arbitrator and that deferral is improper on that basis. However, in *United Parcel Service*, 274 NLRB 396 (1984), the Board upheld an administrative law judge's determination that this kind of evidence was not of such probative value as to necessitate a conclusion that the arbitration panel did not have before it the essential facts as to the issue litigated, and his further conclusion that the General Counsel had failed to carry his burden of proof to demonstrate that the arbitrator's award should be rejected.

See also *Hertz Corp.*, 326 NLRB 1097 (1998). Here, the arbitrator considered all of the

circumstances surrounding Palmer's distribution of the flyer, the Respondent's subsequent investigation, and the Respondent's proffered reasons for her discharge. He concluded that the Respondent had failed to show good cause for the discharge, in essence, discrediting the Hospital's management witnesses.

With regard to the "clearly repugnant" standard, the Board does not require that the award be totally consistent with Board precedent. *Martin Redi-Mix*, 274 NLRB 559, 559 (1985). Rather, the Board will defer unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act. *Laborers*, above at 261; *Olin Corp.*, above at 574. This logically follows from the fact that "[d]eferral recognizes that the parties have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board." *Andersen Sand & Gravel Co.*, above at 1204 fn. 6; see also *Specialized Distribution Management, Inc.*, 318 NLRB 158, 161 (1995). Thus, the Board's disagreement with an arbitrator's conclusion is an insufficient basis for the Board to decline to defer to the arbitrator's award. *Kvaerner Philadelphia Shipyard*, above, at 391; *Smurfit-Stone Container Corp.*, 344 NLRB 658, 659-660 (2005).

In *American Commercial Lines*, 291 NLRB 1066, 1074-1075 (1988), the Board found deferral to arbitration inappropriate because the remedial portion of the award was "arbitrarily limited." In that case, the arbitration board limited the remedy to hiring hall violations occurring during the term of the labor contract and did not address postcontract violations, which therefore went remedied. Nonetheless, the Board added that it would not automatically refuse to defer to arbitration awards that contain incomplete remedies or remedies otherwise not fully consistent with Board precedent. *Id.* at 1089 fn. 44; see also *United Cable Television Corp.*, 299 NLRB 138, 144 fn. 5 (1990). The Board noted the absence of evidence that unlawfully bypassed hiring hall applicants engaged in an activities or behavior "warranting a limitation on backpay amounts otherwise owed." *American Commercial Lines*, *id.* at 1089 fn.44.

In *Cone Mills Corp.*, 298 NLRB 661 (1990), the arbitrator had ordered the employee reinstated without backpay, finding that the discharge was unjust but that she had engaged in insubordination in the course of her protected activity, which merited punishment. In finding the award clearly repugnant, the Board emphasized that the arbitrator's decision was "inherently inconsistent" regarding the employee's alleged insubordination:

[T]he arbitrator's conclusion that Darr's refusal to leave the plant constituted insubordination warranting disciplinary action simply cannot be reconciled with his findings that the conduct was provoked by the Respondent's own wrongful actions and was condoned by the Respondent. Given those findings, the conclusion is inescapable that the refusal to leave the plant cannot properly be the basis for discipline. Thus, we find nothing in the arbitrator's opinion and award that provides a rational basis for the Respondent's discharging Darr, apart from her union activities, or that recounts misconduct that would justify withholding her backpay. . . . [T]he arbitrator's refusal to award Darr backpay has the effect of penalizing Darr for engaging in those protected activities that the arbitrator found precipitated her discharge. . . . (*Id.* at 666-667; fn. omitted.)

On the other hand, in *Specialized Distribution Management, Inc.*, 318 NLRB 158 (1995), the arbitrator had determined that the three employees had engaged in misconduct sufficient to

warrant discipline but that their discharge was too severe a penalty under the collective-bargaining agreement. Therefore, he ordered the discharges converted to suspensions without backpay. The Board upheld Judge James Kennedy's determination that the award was not repugnant to the Act and that deferral was appropriate.

Turning to the facts of this case, the crux of the Acting General Counsel's argument is that Arbitrator Potter's award was repugnant to the Act because he denied Palmer backpay and accrued benefits for the approximately 1-year period that she was effectively suspended. Potter explicitly imposed this penalty on Palmer not for anything relating to her union activity on February 4 but because of his finding that she had lied about when she distributed the flyer, both during the course of the Hospital's investigation and, more importantly, before him in the arbitration hearing. Thus, the portion of the award in question is wholly severable from Palmer's protected activity, as opposed to the situation in *Cone Mills Corp.*, above.

Perjury is a serious offense. As the Supreme Court stated in *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 323 (1994):

False testimony in a formal proceeding is intolerable. We must neither reward nor condone such a "flagrant affront" to the truth-seeking function of adversarial proceedings. . . . In any proceeding, whether judicial or administrative, deliberate falsehoods "well may affect the dearest concerns of the parties before a tribunal. . . . Perjury should be severely sanctioned in appropriate cases. . . .

See also *U.S. v. Holland*, 22 F.3d 1040, 1047 (11th Cir. 1994) ("Perjury, regardless of the setting, is a serious offense that results in incalculable harm to the functioning and integrity of the legal system as well as to private individuals.").

In *ABF Freight System*, above, the Court expressed its "concern" about the employee's false claim under oath but concluded that the Board had not abused its broad discretion by ordering the remedy that the employee be reinstated with backpay. *Id.* at 325.

In exercising such discretion, the Board may penalize employees who lie under oath on a central issue in agency proceedings by denying reinstatement and/or tolling their backpay from the date of such misconduct. See *Precoat Metals*, 341 NLRB 1137, 1139 (2004); *Toll Mfg. Co.*, 341 NLRB 832, 835-836 (2004).

Granted, the deprivation of a year's backpay and benefits is a harsh punishment. However, as the above cases reflect, my role is not to serve as an appellate arbitrator, review the award de novo, or substitute my judgment of what penalty, if any, Arbitrator Potter should have imposed on Palmer for what he deemed her perjury. To do so would undermine the strong public policy in favor of alternative dispute resolution and the parties' agreement to be bound by the decision of the arbitrator whom they mutually selected.

Based on all of the above circumstances, I conclude that Arbitrator Potters' award satisfies the required standards for deferral.⁴¹ Accordingly, I further conclude that the 8(a)(3) and (1) allegation pertaining to Palmer should be dismissed.

⁴¹ As a matter of dicta only, I would reach the same conclusions as Potter, to wit, that Palmer, despite her

Alleged Threat to Higginbotham

Because I have credited Mitchell's version over Higginbotham's and found that he did not threaten her in any way if she filed a grievance, I recommend dismissal of this allegation.

The Respondent's No-distribution Rule

In 8(a)(1) cases, including work rules, the Board's task is to determine how a reasonable employee would interpret the action or statement of the employer and whether the conduct would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights, taking into account the surrounding circumstances. *The Roomstore*, 357 NLRB No. 143, slip op. at 1 fn. 2 (2011); *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). Thus, the standard is an objective one. As the board explained in *Lutheran Heritage Village*, id. at 647, an employer's rule contravenes the Act if it explicitly restricts protected activity, or if (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. The Board further said, id. at 646, that it must give a rule a reasonable reading, refrain from reading particular phrases in isolation, and not presume improper interference with employee rights.

On its face, the provision in the CA guidelines prohibiting employees from engaging in unauthorized distribution of written or printed materials of any description without authorization impinges on employees' Section 7 rights in two ways. First, it is presumptively overly broad in that it covered nonworktime in nonwork areas. See *New York New York Hotel, LLC*, 334 NLRB 762, 763 (2001); *Santa Fe Hotel, Inc.*, 331 NLRB 723 (2000). Second, the rule can reasonably be read to require employees to secure management permission before they engage in Section 7 activities. See *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001); *Brunswick Corp.*, 282 NLRB 794, 795 (1987).

The Respondent contends (Br. 37-38) that the provision should not be viewed in isolation but in the context of what it contends is its lawful formal policy on solicitation and distribution and, "more importantly," the pertinent provisions thereon in the agreement. This argument lacks merit because it places a far too onerous burden on employees. Nothing in the guideline in question mentions or even suggests that other Hospital policies or the agreement affects its application, and employees cannot reasonably be expected to know their impact, if any.

For the above reasons, I conclude that the Respondent has violated Section 8(a)(1) by maintaining an overly broad no-distribution rule requiring employees to obtain permission to engage in any distribution activity.

denials before him (and before me), did distribute the flyer on February 4 on worktime and in a work area without clocking out for union business, but that the discipline imposed on her was disproportional to the severity of the offense.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad no-distribution rule that required employees to obtain permission before engaging in any distribution.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴²

ORDER

The Respondent, Shands Jacksonville Medical Center, Inc., Jacksonville, Florida, shall

1. Cease and desist from

(a) Maintaining any work rule that unlawfully restricts employees' Section 7 rights to engage in distribution activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the work rule prohibiting employees from engaging in unauthorized distribution of written or printed materials of any description.

(b) Within 14 days after service by the Region, post at its facility in Jacksonville, Florida copies of the attached notice marked "Appendix."⁴³ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places at all facilities where the unlawful policy has been or is in effect, including all places where notices to employees are customarily posted. In addition to physical posting of

⁴² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

paper notices, notices should be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

5 In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 25, 2010.

10 (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

15 IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 3, 2012.

20

Ira Sandron
Administrative Law Judge

APPENDIX**NOTICE TO EMPLOYEES**

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain policies that unlawfully restrict your in the exercise of the rights listed above, including your ability to distribute literature on behalf of the American Federation of State, County, and Municipal Employees on nonwork time and in nonwork areas.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the provision in our corrective action guidelines prohibiting you from engaging in the distribution of written or printed materials of any description without our permission.

SHANDS JACKSONVILLE
MEDICAL CENTER, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

South Trust Plaza, 201 East Kennedy Boulevard, Tampa, FL 33602-5824
(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2455.